

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 **SAN JUAN CABLE LLC d/b/a ONELINK**
4 **COMMUNICATIONS,**

5 **Plaintiff,**

6 **v.**

7 **PUERTO RICO TELEPHONE**
8 **COMPANY, INC.**

9 **Defendant.**

CIVIL NO. 09-1322 (GAG)

10 **OPINION AND ORDER**

11 Plaintiff San Juan Cable LLC d/b/a OneLink Communications (“OneLink”) brought this
12 action against the Puerto Rico Telephone Company, Inc. (“PRTC”) seeking injunctive and
13 declaratory relief for alleged violations of the Cable Communications Policy Act, 47 U.S.C. §§ 521
14 et seq. (“Cable Act”), and orders issued by the Federal Communications Commission (“FCC”).
15 OneLink also alleges violations of the Puerto Rico Telecommunications Act, P.R. Laws Ann. tit. 27,
16 §§ 265 et seq. Presently before the court is PRTC’s motion to dismiss OneLink’s amended
17 complaint for failure to state a claim upon which relief can be granted (Docket No. 28). OneLink
18 timely opposed the motion (Docket No. 35), PRTC replied (Docket No. 40), and OneLink surreplied
19 (Docket No. 42). After reviewing the pleadings and pertinent law, the court **GRANTS** PRTC’s
20 motion to dismiss (Docket No. 28).

21 **I. Standard of Review**

22 Under Rule 12(b)(6), a defendant may move to dismiss an action against him for failure to
23 state a claim upon which relief can be granted. See Fed.R.Civ.P. 12(b)(6). When considering a
24 motion to dismiss, the court must decide whether the complaint alleges enough facts to “raise a right
25 to relief above the speculative level.” See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct.
26 1955, 1965 (2007). The court accepts as true all well-pleaded facts and draws all reasonable
27 inferences in the plaintiff’s favor. Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008). However, “the
28 tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable

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1 to legal conclusions.” Ashcroft v. Iqbal, 556 U.S. ___, slip op. at 14 (2009). “Threadbare recitals
2 of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id.
3 (citing Twombly, 550 U.S. at 555). “[W]here the well-pleaded facts do not permit the court to infer
4 more than the mere possibility of misconduct, the complaint has alleged –but it has not ‘show[n]’–
5 ‘that the pleader is entitled to relief.’” Id. at 15 (quoting Fed.R.Civ.P. 8(a)(2)).

II. Relevant Background as Alleged in the Amended Complaint

6 On February 6, 2008, PRTC filed an “Application to Operate in Telecommunications
7 Service” with the Telecommunications Regulatory Board of Puerto Rico (“Board”), through its
8 affiliate Coqui.net Corporation d/b/a Claro TV (“Coqui.Net”). Coqui.Net sought a franchise from
9 the Board to authorize the construction of a cable system and to provide cable television service
10 throughout Puerto Rico. The Board published a “Notice for Franchise Request” in the local press,
11 inviting any interested parties to submit comments on Coqui.Net’s application to the Board.
12 OneLink submitted comments opposing the application, as did other franchised cable providers. The
13 Board held a hearing at which OneLink was heard in opposition to Coqui.Net’s application. At this
14 hearing, the General Manager of Coqui.Net, Carlos García, allegedly revealed that the construction
15 of PRTC’s cable system was already in an advanced stage, such that they could receive part of the
16 signal at their facilities. On October 10, 2008, the Board denied Coqui.Net’s franchise application.
17 This decision was ratified in an October 29, 2008 resolution and order in which the Board allegedly
18 stated that PRTC’s construction of the proposed system before obtaining the franchise violated P.R.
19 Laws Ann. tit. 27, § 269h(a)(1). Notwithstanding the Board’s decision, in November and December
20 of 2008 PRTC continued to construct its cable system, including activities such as excavations,
21 laying of cement, and the installation of specialized equipment cabinets (“IPTV Terminals”)
22 containing “Video Ready Access Devices” (“VRADs”). The IPTV Terminals are necessary
23 components of PRTC’s cable system and are designed to allow PRTC to provide cable service.
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25 On December 11, 2008, PRTC submitted a second franchise application, “Application for
26 Authorization to Provide Video Service,” this time applying on its own behalf rather than through
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1 an affiliate. In its application, PRTC requested that nine of the attached exhibits be treated as
2 confidential and that the proceedings be held in an expedited manner. PRTC also requested “special
3 temporary authority to provide video service” in a separate application (“STA Request”). The STA
4 Request sought authority to continue to construct and operate its cable system and to provide cable
5 service to the homes of up to 200 PRTC employees as part of a beta test, until such time as the Board
6 granted its second franchise application. In a resolution and order dated December 17, 2008, the
7 Board granted PRTC’s STA Request. Subsequently, the Board also granted PRTC’s request that
8 the exhibits be designated as confidential, as well as its request for expedited review of the franchise
9 application. On January 13, 2009, OneLink filed with the Board a motion to intervene in the
10 proceedings regarding PRTC’s second franchise application, and requested that the STA order be
11 stayed until OneLink and other interested parties had an opportunity to present their opposition. On
12 January 30, 2009, OneLink filed a motion for the Board to vacate or stay its confidentiality
13 determinations.

14 On February 10, 2009, while its motions were pending before the Board, OneLink filed a
15 verified complaint and application for a temporary restraining order and preliminary injunction with
16 this court against PRTC and the Board. See Civil No. 09-1119 (GAG), Docket No. 1. The
17 complaint sought an order preliminarily enjoining and restraining the effect of the STA order, and
18 the Board from authorizing PRTC to provide cable service or construct a cable system over public
19 rights-of-way unless and until the Board issued its final decision granting PRTC’s franchise request.
20 On February 18, 2009, this court issued an Opinion and Order finding that there had been a violation
21 of section 621 of the Cable Act, 47 U.S.C. § 541(b)(1), which states that a cable operator cannot
22 provide cable services without a franchise, because PRTC’s beta test constituted the provision of
23 cable service prior to the adjudication of such franchise authority. See Civil Case No. 09-1119
24 (GAG), Docket No. 48 at 3-4, San Juan Cable LLC v. Telecommunications Regulatory Bd. of Puerto
25 Rico, 598 F. Supp. 2d 233, 236 (D.P.R. 2009). The court noted that, therefore, OneLink had a strong
26 likelihood of success on the merits, and ordered the Board and PRTC to show cause why a
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1 preliminary injunction should not issue under the remaining three injunction factors. Id. The
2 following day, PRTC submitted to the Board a “Request to Discontinue Special Temporary
3 Authority,” and, on February 20, 2009, PRTC and the Board filed a joint response to the order to
4 show cause, as well as a motion to dismiss, claiming that OneLink’s complaint and TRO application
5 were effectively moot because the Board would soon issue an order granting PRTC’s request to
6 discontinue the STA order. Accordingly, on February 23, 2009, the Board filed its resolution and
7 order discontinuing PRTC’s special temporary authority. OneLink then opposed the motion to
8 dismiss, arguing that the Board’s grant of PRTC’s request was insufficient to undo the STA order
9 in its entirety because it might still permit PRTC to construct its cable system over public-rights-of-
10 way without a franchise. On February 24, 2009, PRTC and the Board filed separate papers in
11 support of their motion to dismiss. The Board stated that as a result of the February 23, 2009
12 resolution and order PRTC could no longer conduct the beta test of IPTV, build its network, or
13 provide cable service, unless and until the franchise was granted. Meanwhile, PRTC represented
14 to the court that the activity authorized by the STA order had been discontinued. Later that day, this
15 court issued an order dismissing OneLink’s complaint and TRO application as moot, and judgment
16 was entered accordingly. See Civil Case No. 09-1119 (GAG), Docket Nos. 61 & 62.

17 On March 2, 2009, the Board denied OneLink’s motions to intervene in its consideration of
18 PRTC’s second franchise application, as well as the motion for reconsideration of its confidentiality
19 determinations. OneLink appealed these decisions to the Puerto Rico Court of Appeals in an action
20 titled San Juan Cable LLC v. Junta Reglamentadora de Telecomunicaciones, Case No.
21 KLRA200900260 (P.R. App. Ct.), on March 3, 2009. The Court of Appeals then issued an order
22 staying all proceedings as to the second franchise application, pending resolution of the appeal. On
23 March 31, 2009,¹ the Court of Appeals affirmed the resolution of the Board regarding the request
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26 ¹ OneLink’s amended complaint states that the judgment of the appeals court was issued
27 on April 7, 2009, yet in other documents submitted by the parties it appears that the judgment is
dated March 31, 2009. See Docket Nos. 28-3, 31-2. The court understands this to mean that the

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1 for intervention,² stating that OneLink's right to intervene would arise once the permit or franchise
2 request was granted. See Judgment by the Puerto Rico Court of Appeals, Docket No. 31-2 at 17.
3 OneLink subsequently filed a motion for reconsideration, which was denied on April 24, 2009. On
4 May 20, 2009, the Supreme Court of Puerto Rico granted OneLink's petition for certiorari to review
5 the Court of Appeal's decision and ordered the Board to stay all proceedings.

6 Meanwhile, on February 25 and 26, 2009, within two days of this court's order and judgment
7 dismissing OneLink's federal complaint and TRO request, employees and/or agents of PRTC had
8 engaged in excavation, construction, and installation activities for the purpose of constructing
9 PRTC's proposed cable system.³ PRTC employees and/or agents worked on IPTV Terminals
10 containing VRADs located in the Caparra and Suchville sectors of Guaynabo. They also constructed
11 an aerial extension to an IPTV Terminal located at one of these sites in order to connect it to electric
12 utility poles on the other side of the street. Later, on March 12, 2009, employees and/or agents of
13 PRTC again engaged in excavation, construction, and installation activities at the same Guaynabo
14 sites. In addition, on March 25, 2009, PRTC solicited members of the public to enter their Hato Rey
15 facilities and granted them access to view the operation of PRTC's cable service.

16 In response to these activities, on March 25, 2009, OneLink filed a Rule 60 motion for relief
17 from this court's February 24, 2009 order and judgment, and for the imposition of sanctions against
18 PRTC. See Civil Case No. 09-1119 (GAG), Docket No. 64. This court then ordered PRTC to show
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20 judgment was notified to the parties on April 7th.

22 ² The Court of Appeals declined to review the issue of the confidentiality of PRTC's exhibits
23 because it lacked jurisdiction at that stage in the proceedings to consider an interlocutory resolution
24 by the Board. See Judgment by the Puerto Rico Court of Appeals, Docket No. 31-2 at 17-19.

25 ³ OneLink alleges that at least some of these activities had no other purpose or use, though
26 no factual allegations are offered in support of this conclusion. Therefore, the court disregards the
27 allegation as conclusory for purposes of PRTC's motion to dismiss. See Ashcroft, 556 U.S. ___,
slip op. at 14 (2009).

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1 cause at a March 27, 2009 hearing as to why it should not, pursuant to Rule 60, vacate its judgment,
2 enter an injunction as originally requested by plaintiff, and order sanctions against PRTC. At the
3 hearing, the court suggested to OneLink that it should commence a new action against PRTC in
4 order to promote judicial economy and allow the court to go directly to the merits of OneLink's
5 claim. On April 2, 2009, OneLink filed the original complaint in the present action (Docket No. 1),
6 seeking declaratory and injunctive relief against PRTC. In its amended complaint of April 16,
7 2009 (Docket No. 24), OneLink avers that on April 3rd and 6th PRTC employees and/or agents once
8 again engaged in excavation, construction, and installation activities which were directly related to
9 the construction of PRTC's cable system.⁴

III. Discussion

11 OneLink alleges that PRTC violated section 621 of the Cable Act, which prohibits the
12 construction or operation of a cable system over public rights-of-way, or the provision of cable
13 service, without first obtaining a valid cable franchise. See 47 U.S.C. §§541(a)(2) & (b)(1).
14 OneLink also alleges that PRTC violated two FCC orders, which contain the same prohibition.
15 See In re Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution
16 Systems of Video Entertainment Access to the 18 Ghz Band, 6 F.C.C.R. 1270, 6 FCC Rcd. 1270
17 (Feb. 28, 1991) ("1991 FCC Report and Order"); In re Implementation of Section 621(a)(1) of the
18 Cable and Communications Policy Act of 1984, 22 F.C.C.R. 5101, 22 FCC Rcd. 5101 (Mar. 5,
19 2007) ("2007 FCC Report and Order"). PRTC now moves to dismiss OneLink's claim (Docket No.
20 28) on various grounds, including that the Cable Act does not provide a private right of action for
21 a cable incumbent to sue a prospective new entrant in order to enforce statutory franchise
22 requirements. Likewise, PRTC argues that there is no standing under the Cable Act for the
23 enforcement of the two FCC orders that OneLink alleges were violated.

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26 ⁴ Once again, OneLink alleges that at least some of these activities had no other purpose or
27 use, yet offers no factual allegations in support of its conclusion. The court must, therefore,
28 disregard the allegation as conclusory.

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1 In support of its argument, PRTC cites Rollins Cablevue, Inc. v. Saienni Enterprises, 633 F.
2 Supp. 1315 (D. Del. 1986), a district court case which held that Rollins, as a cable operator, did not
3 have a private right of action under the Cable Act to seek to enjoin defendants from constructing and
4 operating a satellite television system on the ground that it would violate the Cable Act. The court
5 reasoned that, because there is no provision in the Cable Act creating a private remedy for a
6 franchised cable operator to enjoin unfranchised cable systems, the court had to review the four
7 factors articulated by the Supreme Court in Cort v. Ash, 422 U.S. 66 (1975), in order to determine
8 if such a private right of action was implicit in the Cable Act: (1) whether the plaintiff is one of the
9 class for whose special benefit the statute was enacted; (2) whether there is any indication of
10 legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether
11 implication of such a remedy is consistent with the underlying purposes of the general legislative
12 scheme; and (4) whether implying a federal remedy is inappropriate because the subject matter
13 involves an area basically of concern to the states. Id. at 78.

14 The Delaware District court reviewed the legislative history of the Cable Act and identified
15 two predominant objectives: “(1) to make the local franchising process the primary means of cable
16 television regulation, and 2) to insure that the public receives the widest possible diversity of
17 information services and sources, in a manner which is responsive to the needs and interests of the
18 local communities.” Rollins Cablevue, Inc., 633 F. Supp. at 1318 (citing Housatonic Cable Vision
19 v. Dept. of Public Utility, 622 F. Supp. 798, 811 (D. Conn. 1985)). The court also noted that, where
20 Congress explicitly created rights of action under the Cable Act for the enforcement of these
21 objectives, it did so either to (1) establish a process which protects the cable operator against unfair
22 denial of renewal by the franchising authority, or (2) to permit a consistency in the decisions reached
23 with respect to the diversification of information sources.⁵ The court further noted that the Cable

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26 ⁵ Specifically, the court pointed out Section 635 of the Cable Act, 47 U.S.C. § 555, which
27 provides any cable operator, adversely affected by a final decision made by a franchising authority
28 on modification or renewal, to bring an action in a Federal district court or in a state court; and
Section 612 of the Cable Act, 47 U.S.C. § 532, which specifies a right of action for persons,

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1 Act is an amendment of the Communications Act of 1934, which has traditionally been interpreted
2 by the courts as not creating private rights of action. See Scripps Howard Radio, Inc. v. Federal
3 Communications Commission, 316 U.S. 4, 14 (1942) (“The Communications Act of 1934 did not
4 create new private rights. The purpose of the Act was to protect the public interest in
5 communications.”), quoted in Rollins Cablevue, Inc., 633 F. Supp. at 1319; Comtronics, Inc. v.
6 Puerto Rico Tel. Co., 409 F. Supp. 800, 811-12 (D.P.R. 1975) (recognizing that the Communications
7 Act of 1934 did not create any private rights) (citing Scripps, 316 U.S. 4 (1942); New England Tel.
8 & Tel. Co. v. Public Utilities Comm’n of Maine, 565 F. Supp. 949, 955-56 (D. Me. 1983) (“In order
9 to insure that the FCC, through its discretion and expertise, will be able to foster beneficial and
10 proper interpretations and applications of the Communications Act, the Act is generally viewed as
11 not having created implied private rights of action, either for damages, or for injunctive relief.”)
12 (internal citations and quotation marks omitted), quoted in Rollins Cablevue, Inc., 633 F. Supp. at
13 1319-20. The Delaware District Court reasoned that, since the FCC is seen as the interpreter of the
14 Communications Act, it would seem that, except in especially designated areas, the local franchising
15 authorities are intended to be the regulators and enforcers of the Cable Act. The court also found
16 it significant that, as an amendment to the Communications Act of 1934, the Cable Act specified
17 Federal court remedies only in limited areas. Thus, the court concluded that, in light of the four
18 factors set out by the Supreme Court in Court v. Ash, it found no intent, express or implicit, to create
19 a private right of action in a cable operator to enjoin the construction and operation of an allegedly
20 unfranchised rival cable system.

21 After conducting its own independent research, this court finds that the reasoning of the
22 Delaware District Court in Rollins Cablevue, Inc. is sound, and concludes that OneLink lacks
23 standing in this case to bring a private cause of action against PRTC, an unfranchised rival cable
24 operator, to enjoin the construction and operation of its cable system. In so holding, the court takes

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26 aggrieved by the refusal of a cable operator to make commercial channel capacity available, to bring
27 suit in Federal court to compel that such capacity be made available. See Rollins Cablevue, Inc., 633
28 F. Supp. at 1319.

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1 into account OneLink's argument that depriving it of the right to bring suit in Federal court might
2 render the Cable Act's franchising requirements "unenforceable and essentially meaningless."
3 OneLink's Opposition, Docket No. 35 at 12-15, 27. However, whether or not the scheme envisioned
4 by Congress would render its franchising requirements "meaningless" or "unenforceable" is not for
5 this court to determine or consider when evaluating the existence, under Court v. Ash, of an implied
6 private cause of action under the Cable Act.

7 PRTC also argues that the Cable Act does not provide a private right of action to enforce the
8 FCC orders referenced in the complaint, because these are FCC rulemaking orders of general
9 applicability. This court agrees. In New England Telephone and Telegraph Company v. Public
10 Utilities Commission of Maine, 742 F.2d 1 (1st Cir. 1984), the First Circuit found that an FCC order
11 that was the product of a "rulemaking proceeding" did not fall under the Cable Act's definition of
12 "order" for purposes of 47 U.S.C. § 401(b), which provides a private right of action to injured parties
13 for the enforcement of FCC orders.⁶ The court determined that section 401(b) does not apply beyond
14 the context of "adjudicatory orders," or "final disposition[s], whether affirmative, negative,
15 injunctive, or declaratory in form, of an agency *in a matter other than rulemaking* [. . .]" Id. at 5
16 (quoting the Administrative Procedure Act, 5 U.S.C. § 551(6)). The order at issue in New England
17 Telephone was, in the court's view, "an agency statement of general [. . .] applicability and future
18 effect designed to implement, interpret, or prescribe law or policy [. . .]" Id. at 4 (quoting the
19 Administrative Procedure Act, 5 U.S.C. § 551(4)). The court understood that "to interpret section
20 401(b) more broadly –to apply it beyond the context of the 'adjudicatory order'– threatens to
21 interfere seriously with the well established principle that the 'enforcement' of the Communications
22 Act is 'entrusted primarily to an administrative agency.'" Id. at 5 (quoting Massachusetts

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25 ⁶ The statute states, in part, as follows: "If any person fails or neglects to obey any order of
26 the Commission other than for the payment of money, while the same is in effect, the Commission
27 or any party injured thereby, or the United States, by its Attorney General, may apply to the
28 appropriate district court of the United States for the enforcement of such order [. . .]" 47 U.S.C.
§ 401(b).

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1 Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 500 (1st Cir. 1950)). The court
2 also reasoned that, because rules are general in form and can be highly general in content, “to apply
3 a rule to particular cases often (though not always) requires not only adjudicatory fact finding, but
4 also interpretation of the rule’s scope and meaning.” Id. at 6 (citations omitted). “To construe
5 401(b) to include a private right to enforce commission rules would place this interpretative function
6 squarely in the hands of private parties and some 700 federal district judges, instead of in the hands
7 of the Commission.” Id.

8 In this case, OneLink invokes the 1991 FCC Report and Order, which states that “firms
9 seeking to construct and operate ‘cable systems’ as defined in [47 U.S.C. § 522(6)] must first obtain
10 a franchise from the state government or its local designate.” Id. at 1272 ¶ 12. OneLink also
11 invokes the 2007 FCC Report and Order, which it interprets as establishing that, even when an entity
12 contends that its construction might have “mixed-uses,” it still has an obligation to obtain a cable
13 franchise before beginning such construction once it “proposes to offer cable services.” Id. at 5155
14 ¶ 121. These are FCC rulemaking decisions of the sort that the First Circuit determined were beyond
15 the scope of 47 U.S.C. § 491(b). Like in New England Telephone, both of these FCC orders were
16 the product of rulemaking proceedings in which OneLink had no participation. The 2007 FCC
17 Report and Order states that the purpose of the order is to adopt rules and provide guidance to
18 implement Section 621(a)(1) of the Cable Act, as a result of a “Notice of Proposed Rulemaking”
19 issued *sua sponte* by the FCC. Id. at 5102 ¶ 1, 5106 ¶ 10. Likewise, the 1991 FCC Report and
20 Order states that it constitutes final action amending the FCC’s rules to reflect proposals contained
21 in its “Notice of Proposed Rule Making,” issued in response to a “Petition for Rule Making” filed
22 by Todd Integrated Systems, Inc., the owner and operator of a satellite cable system in the New York
23 area. Id. at 1270 ¶ 1, 5. Both orders resulted in FCC statements of general applicability and future
24 effect designed to implement, interpret, or prescribe law or policy, and did not adjudicate the rights
25 of individuals, much less the rights of OneLink in particular. See Columbia Broadcasting System,
26 Inc. v. United States, 316 U.S. 407, 418 (1942) (“Unlike an administrative order or a court judgment
27 adjudicating the rights of individuals, which is binding only on the parties to the particular
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proceeding, a valid exercise of the rulemaking power is addressed to and sets a standard of conduct for all to whom its terms apply.”), quoted in New England Telephone, 742 F.2d at 6. Thus, the court follows the binding precedent established by the First Circuit in New England Telephone⁷ and concludes that, because the FCC orders at issue in this case constitute rules of general applicability, OneLink lacks standing under 47 U.S.C. § 401(b) to sue PRTC for their enforcement. Having determined that OneLink lacks standing to bring this suit, the court lacks authority to consider the other arguments raised by the parties regarding the legality of PRTC's alleged construction activities.

Finally, because no federal claims to ground jurisdiction remain in this case, OneLink's supplemental state law claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

IV. Conclusion

For the reasons set forth above, the court **GRANTS** defendant's motion to dismiss (Docket No. 28). This ruling, however, is without prejudice to Onelink filing suit once a franchise is awarded to PRTC, should this happen in any event.

SO ORDERED.

In San Juan, Puerto Rico this 27th day of May, 2009.

S/ Gustavo A. Gelpi

GUSTAVO A. GELPI
United States District Judge

⁷ The court rejects OneLink's invitation to ignore what is still binding precedent from the First Circuit, in favor of the opposing view held by a "majority of circuit courts." OneLink's Opposition, Docket No. 35 at 26. Moreover, its invocation of Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 550 U.S. 45 (2007) (holding that 47 U.S.C. § 207 authorizes a federal-court lawsuit brought by a person who was injured by violations of 47 U.S.C. § 201(b), which prohibits "unreasonable practices" in the provision of communication services), is misplaced, for that case was decided in the context of 47 U.S.C. §§ 201(b) and 207, not 47 U.S.C. § 401(b), which is the statute at issue in this case and in regards to which the First Circuit has established a clear standard for determining jurisdiction. Whether or not the Supreme Court's decision in Global Crossing might "undercut" this court's reliance on the First Circuit's decision in New England Telephone, it did not override its precedential value with regards to 47 U.S.C. § 401(b) and this court must, therefore, abide by the First Circuit's decision.